IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUSTIN DOUGLAS HAYNES, Appellant.	)	No. 53443-2-I (Consolidated with No. 54169-2-I and No. 54533-7-I) DIVISION ONE UNPUBLISHED FILED: July 3, 2006

PER CURIAM – Justin Haynes pleaded guilty to two counts of child molestation in the first degree in 1999. The sentencing court imposed exceptional sentences of 178 months on each count. Haynes now appeals the court's denial of his post-conviction motion to vacate his conviction and exceptional sentence. He also has filed two personal restraint petitions, challenging the judgment and sentence entered on his conviction for child molestation. We consolidated the petitions with his appeal for purposes of review and disposition.

Haynes has not established a valid basis for granting any relief. Accordingly, we affirm the trial court's order denying Haynes' CrR 7.8 motion and dismiss Haynes' consolidated personal restraint petitions.

In 1997, Child Protective Services received information that Haynes had sexually and physically abused his eight-year-old stepdaughter, M.D. During

subsequent interviews with police and others, M.D. described the multiple incidents of abuse in graphic detail. The State thereafter charged Haynes with two counts of first degree rape of a child and one count of fourth degree assault.

As part of a negotiated plea agreement, Haynes pled guilty to the reduced charges of two counts of first degree child molestation. In exchange for Haynes' agreement to plead guilty, the State agreed to recommend that Haynes be sentenced to the high end of the standard range. In the plea form he signed, Haynes stated that he was guilty because "between 8/2/95 and 8/7/95, in King County Washington, [he] twice had sexual contact with [M.D.] who was less than 12 years old and more than 36 months younger than [him]. We were not married." The court accepted Haynes' plea, finding it to be knowingly, intelligently, and voluntarily made.

Prior to sentencing, the court indicated that it was considering imposing an exceptional sentence upward. The court held an evidentiary hearing to determine whether such a sentence was warranted. At the beginning of the hearing, defense counsel informed the court that Haynes wished to withdraw his guilty plea based on a claim of ineffective assistance of counsel. The court denied the request to withdraw and indicated that defense counsel would be allowed to withdraw as counsel after the sentencing hearing.

The court heard live testimony on the sentencing issue. Various witnesses testified about several incidents of sexual and physical abuse by Haynes that M.D.

had described to them. M.D. did not testify. Haynes denied ever sexually or physically abusing M.D. At the conclusion of the hearing, the court imposed an exceptional sentence of 178 months, which was twice the top end of the standard range, on each count.

With the assistance of new counsel, Haynes moved to withdraw his guilty plea. Following an evidentiary hearing, the superior court denied Haynes' motion.

Haynes appealed his plea-based conviction and exceptional sentence to this court, which affirmed in State v. Haynes, No. 44974-5-I. The case was eventually mandated on October 30, 2002.

On September 25, 2003, Haynes moved to vacate the judgment and sentence pursuant to CrR 7.8. The trial court summarily denied the motion.

Haynes appeals that decision and also filed two personal restraint petitions, collaterally attacking his underlying child molestation conviction and sentence. We have consolidated the petitions with the appeal for review and disposition.

We first consider the claims raised by Haynes and his counsel in this successive appeal. After addressing the sole claim raised by appellate counsel, we next consider the issues raised by Haynes, pro se, in his Statement of Additional Grounds for Review dated February 13, 2004.[1] Finally, we address the issues

[1] Haynes filed three other statements of additional grounds for review. Assuming without deciding that they are properly before us, they essentially repeat claims raised in his two personal restraint petitions.

raised in Haynes' two personal restraint petitions.

RIGHT TO COUNSEL

Haynes contends that he was entitled to counsel at state expense when he moved to withdraw his guilty plea after sentencing pursuant to CrR 7.8. We hold that he was not entitled to counsel for that purpose.

Haynes does not dispute that there is no constitutional right to counsel in postconviction proceedings, other than the first direct appeal of right. See State v. Winston, 105 Wn. App. 318, 321, 19 P.3d 495 (2001). Rather, he argues only that the plain language of CrR 3.1(b)(2)[2] requires appointment of counsel for his motion.

The Washington Supreme Court rejected virtually the same claim in State v. Robinson, 153 Wn.2d 689, 107 P.3d 90 (2005), holding that CrR 3.1(b)(2) does not require that counsel be appointed for all defendants who move to withdraw their guilty pleas after sentencing under CrR 7.8. Where, as here, there is no showing that the motion established any grounds for relief, there is no right to counsel at the CrR 7.8 stage. Robinson, 153 Wn.2d at 699.

INEFFECTIVE ASSISTANCE OF COUNSEL

Haynes contends that he was denied his constitutional right to counsel when the trial court required his attorney to continue representing him at the sentencing

[2] The rule provides that "[a] lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review."

hearing even after the attorney asserted a potential conflict of interest. Haynes argues that the court erred in failing to "adequately" inquire into the potential conflict between him and his attorney. We rejected virtually the same argument in Haynes' direct appeal in No. 44974-5-I. Haynes has not identified any fundamental error, intervening change in the law, or other circumstance justifying reconsideration of this issue. Accordingly, we do not address this claim further.

DOUBLE JEOPARDY

Haynes also argues that double jeopardy prohibits his conviction for two counts of child molestation. But the prohibition against double jeopardy protects against multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). In this context, the federal and state double jeopardy clauses provide identical protections. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Here, the record shows that the crimes Haynes committed occurred in separate incidents. Thus, Haynes' conviction for two counts of first degree child molestation does not violate the prohibition against double jeopardy.

CLAIMED COERCION

Haynes also appears to argue that he was coerced into pleading guilty. His assertions, however, are too conclusory to demonstrate that his plea was constitutionally infirm. Haynes does not dispute that he signed a written plea

statement or attended a formal plea hearing. These practices and procedures provide prima facie verification of the voluntariness of his pleas. See State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984); State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). And, while Haynes alleges that the State used "threats" during the plea process, and disputes the strength of the State's evidence, Haynes cannot base these claims on conclusory allegations alone.

While "[t]he constitution requires that a plea of guilty be knowing, intelligent and voluntary[,]" In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983), nothing in the record here suggests that Haynes' plea was anything other than knowing, intelligent, and voluntary. Haynes' bare allegations, by themselves, are simply not sufficient to establish a basis for withdrawing his guilty plea. Osborne, 102 Wn.2d at 97.

OFFENDER SCORE

Haynes raises a number of claims based on the belief his offender score was miscalculated. He argues that the sentencing court should not have counted his conviction of two counts of first degree child molestation separately when calculating the offender score as three points. This argument is not supported by the record.

Under the Sentencing Reform Act of 1981 (SRA), multiple offenses are counted as one offense in determining the offender score only if they encompass the same criminal conduct. RCW 9.94A.589(1)(a). To constitute the same criminal conduct for purposes of determining an offender score at sentencing, two or more

criminal offenses must involve (1) the same objective intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a). "'If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.'" State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (quoting State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).

Here, there is no showing that Haynes preserved this issue by raising a timely objection. See State v. Ross, 152 Wn.2d 220, 230-31, 95 P.3d 1225 (2004); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002); State v. Wilson, 117 Wn. App. 1, 21, 75 P.3d 573, review denied, 150 Wn.2d 1016 (2003) (defendant may waive right to assert that trial court should have made "same course of criminal conduct" determination at sentencing); State v. Nitsch, 100 Wn. App. 512, 518-20, 997 P.2d 1000 (2000).

In any event, Haynes has not established that the two counts of first degree child molestation for separate incidents fit within the statutory definition of "same criminal conduct." Unlike the situation in State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996), and other cases cited by Haynes, in this case the record suggests that the crimes were not committed through continuous sexual behavior over a short period of time. Nothing indicates that the sentencing court should have counted the crimes Haynes committed as one offense rather than separate offenses.

OTHER SENTENCING ISSUES

Haynes also contends that he should have been advised of his rights to counsel and to remain silent during a presentence interview he had with a Community Corrections Officer (CCO). We hold that any error was harmless.

Miranda warnings were not given to Haynes during the interview. Haynes argues that his statements at the interview should not have been admitted into evidence at the sentencing hearing. But Haynes admitted at sentencing that he told the presentence interviewer that he committed the offenses. Haynes stated that he made that tactical decision in order to get a SSOSA evaluation. Moreover, Haynes testified that he made similar admissions during the SSOSA evaluation and in his plea statement. Any error in admitting his interview statements at the hearing was harmless beyond a reasonable doubt.

Haynes also argues that his CCO was prohibited under the SRA from presenting a sentencing recommendation. We disagree.

The law is well established that a CCO is authorized to recommend a specific sentence to the sentencing court. State v. Sanchez, 146 Wn.2d 339, 353-54, 46 P.3d 774 (2002); State v. Harris, 102 Wn. App. 275, 287-88, 6 P.3d 1218 (2000). There was no error.

Haynes' contention that the trial court erred by imposing exceptional sentences of 178 months is similarly without merit. We note that this court, in Haynes' direct appeal, rejected an argument that the exceptional sentences were improperly imposed. Although the exceptional sentences were twice the standard

range, the record does not support Haynes' claim that the sentences were either excessive or imposed vindictively.

CRAWFORD

Haynes, in a personal restraint petition filed on April 28, 2004, argues that the admission of M.D.'s hearsay statements at sentencing violated his right to confrontation under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This claim fails.

Haynes' conviction and sentence became final on October 30, 2002, when the mandate issued following his direct appeal. Because Crawford is not applied retroactively, it does not provide a basis for granting any relief. In re Pers. Restraint of Markel, 154 Wn.2d 262, 273, 111 P.3d 249 (2005).

BLAKELY

Haynes, in a personal restraint petition filed on July 13, 2004, contends that his constitutionally protected right to a jury trial was violated when the trial court imposed the 178-month exceptional sentences. We disagree.

Relying on the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2538, 159 L. Ed. 2d 403 (2004), Haynes argues his sentence must be reversed and remanded for

resentencing within the standard range. Because neither Apprendi nor Blakely applies retroactively, these cases do not provide support for this argument. State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005). Accordingly, this successive petition is barred under RCW 10.73.140.

MARITAL PRIVILEGE

Haynes also argues that the marital privilege of RCW 5.60.060(1) barred his wife, and M.D.'s mother, from testifying at his sentencing hearing. We again disagree.

The statute on which Haynes relies contains an exception to the marital testimonial privilege. The exception applies for crimes committed by a spouse against any child for whom the spouse is a parent or guardian. "It was the intent of the legislature in carving out this exception to the marital privilege to subordinate the privilege to the overriding legislative interest in protecting children from sexual abuse." State v. Bouchard, 31 Wn. App. 381, 387, 639 P.2d 761 (1982). Because the facts of this case fit within the exception, there is no bar to the testimony of Haynes' wife.

We affirm the trial court order denying Haynes' CrR 7.8 motion and dismiss Haynes' two consolidated personal restraint petitions.

For the Court:

/s/ Cox, J.

/s/ Baker, J.

/s/ Ellington, J.